Supreme Court, U.S.
FILED
JAN 8 2002
CLERK

(5)

No. 01-694

In the

Supreme Court of the United States

STERLING CONSULTING CORPORATION,
a Colorado corporation, as receiver for the
Indian Motorcycle Manufacturing Inc.,
a New Mexico corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF

JOHN M. TANNER
Counsel of Record
FAIRFIELD & WOODS, P.C.
1700 Lincoln Street
Suite 2400
Denver, Colorado 80203-4524
(303) 830-2400
Attorney for Petitioner

11pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

TABLE OF AUTHORITIES

FEDERAL CASES

BOB JONES UNIV. V. SIMON, 416 U.S. 725, 736-737 (1974)..... 5
ELIA V. CONNET, 908 F.2D 521, 523, 526 (9TH CIR. 1990)..... 6
IN RE STATE OF CAL. V. REGAN, 641 F.2D 721, 722-23 (9TH CIR. 1981)..... 6
MARYLAND V. UNITED STATES, 381 U.S. 41 (1965)..... 5
MILLER V. TONY AND SUSAN ALAMO FOUNDATION, 975 F.2D 547 (8TH CIR. 1992)..... 3
MILLER V. TONY AND SUSAN ALAMO FOUNDATION, 134 F.3D 910, 916 (8TH CIR. 1998)..... 3
SCHILLING V. ROGERS, 363 U.S. 666 (1960)..... 3
SIREN, 74 U.S. (7 WALL) 152, 154 (1868)..... 3
UNITED STATES V. THE THEKLA, 266 U.S. 328, 340-341 (1924).. 3
WABASH RY. CO. V. ADELBERT COLLEGE, 114 U.S. 587 (1908)... 6
WISCONSIN V. FEDERAL POWER COMMISSION 373 U.S. 294 (1963)..... 5

FEDERAL STATUTES

26 U.S.C. § 6501(d)..... 6
26 U.S.C. § 6861..... 2
26 U.S.C. § 7424..... 4
28 U.S.C. § 7424..... 8
31 U.S.C. § 3713..... 6

ARGUMENT

The IRS's response brief, when compared to the 10th Circuit Opinion, perfectly underscores the need for this Court to grant certiorari. In that brief, the IRS does not seriously contend that the 10th Circuit's analyses of the Declaratory Judgment Act and the Tax Injunction Act were correct. Rather, it contends it was protected from the Orders of the District Court by the doctrine of sovereign immunity. This is the issue that was briefed in the District Court and this is the issue that the IRS submitted for review to the 10th Circuit. The sovereign immunity issue was not, however, addressed by the 10th Circuit. Instead, the 10th Circuit engaged in an analysis not briefed by either party, and, unfortunately, reached the wrong result.[1]

Another excellent way to underscore the need for this Court to grant certiorari is to observe the narrow circumstances that give rise to the issue and the importance of maintaining the law in connection with those narrow circumstances. It is not often a separation of powers issue is so clearly laid out for this Court, nor one where the Judicial Branch so clearly invites future transgressions into its exclusive jurisdiction.

This is a case where the IRS voluntarily elected to emerge from the Executive Branch, intervene in an *in rem* case pending before a United States District Court, and ask for relief in connection with the entire *res* of the Receivership Estate. This is not a case where a receiver or the District Court attempted to invade the inactive recesses of the Executive Branch and restrain the assessment of taxes. There is no question that had the IRS not intervened, the District Court would have had no jurisdiction upon which to

---

[1]As it discussed more fully below, the 10th Circuit's facial analysis of the Declaratory Judgment Act has been determined by this Court to be wrong. *See Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-737 (1974) (recognizing two unwritten, judicially created exceptions to the prohibition on declaratory judgments regarding federal taxes) and its progeny (*Elia v. Connet*, 908 F.2d 521, 523, 526 (9th Cir. 1990) (same); *In re State of Cal. v. Regan*, 641 F.2d 721, 722-23 (9th Cir. 1981) (same)).

base its declaratory order. In other words, the holding of the 10th Circuit regarding the Declaratory Judgment Act would have been correct had the IRS not intervened. If left unattended, however, the 10th Circuit decision will invite intervention by the IRS in receiverships (and other *in rem* cases) for limited purposes, thereby allowing the IRS to affect the distribution of assets without filing its claims (*i.e.*, assessing).[2]

The 10th Circuit's error, and yet another reason for this Court to grant certiorari, was partly driven by a record that did not address the Declaratory Judgment Act at all. To enter this decision, the 10th Circuit had to review a record prepared for a completely different purpose and assume that the findings necessary to support the application of the Declaratory Judgment Act were present (*i.e.*, that *Bob Jones* and its progeny did not apply). There was no effort made by the IRS nor the receiver to make such a record and none was made by the District Court *sua sponte* because the issue did not arise until the 10th Circuit entered its Opinion.

Sovereign immunity was the issue that was submitted to the 10th Circuit because it is dispositive of not only the declaratory judgment and injunction issued by the District Court, but it is also dispositive of the other issues that were embodied in the appeal.[3] For reasons unknown to the receiver, however, the 10th Circuit ignored that issue and ruled on the face of the Declaratory Judgment Act. This issue had not been fully briefed by the parties. The 10th Circuit

---

[2] A proper treatment of this case does not leave the IRS unable to protect itself in these circumstances. In fact patterns like this, the IRS may simply serve the receiver with a levy and collect on the levy when the receivership estate is distributed. If the IRS then believes its ability to assess and collect are in jeopardy, it may file a claim under 26 U.S.C. § 6861. That, however, would also submit the IRS to the jurisdiction of the District Court, but that is as it should be.

[3] For example, one issue that has plagued the District Court Estate since the decision by the 10th Circuit is whether the IRS remains in the Receivership Action. The District Court has found that the IRS is a party, but the IRS has threatened to appeal any determination of the District Court that affects it on the grounds that it is not a party, despite its intervention.

Opinion nowhere discusses the nature of the waiver of sovereign immunity when the IRS intervenes in an *in rem* case.[4] Indeed, the 10th Circuit opinion never once even mentions in *in rem* nature of receiverships in general or this one in particular.

Te IRS's analysis of the waiver of sovereign immunity issue is simply wrong based on the holdings of this Court. *United States v. The Thekla*, 266 U.S. 328, 340-341 (1924) and *The Siren*, 74 U.S. (7 Wall) 152, 154 (1868). Each of these cases states that when the sovereign intervenes in an *in rem* action it waives sovereign immunity for all purposes regarding the *res*. This is still the law of the United States. The IRS has attempted to circumvent the law by purportedly intervening for a limited purpose in an *in rem* case, and the 10th Circuit opinion below is enabling that circumvention.

The IRS's brief mischaracterizes the holding in *Miller II* (*Miller v. Tony and Susan Alamo Foundation*, 134 F.3d 910, 916 (8th Cir. 1998). Both that case and the case it followed *Miller I* (*Miller v. Tony and Susan Alamo Foundation*, 975 F.2d 547 (8th Cir. 1992)), are *in personam* cases. *Miller I* involved the IRS's intervention in a case to claim proceeds of a sale of seized real and personal property by the United States Marshall to satisfy a judgment lien in favor of the Millers. *Miller II* involved the IRS's seizure of completely separate real property. In *Miller II*, the Millers attempted to challenge the seizure by the IRS of assets never subject to the jurisdiction of the District Court where they had obtained their judgment, arguing that the prior intervention by the IRS regarding the other property

---

[4]It is common for appellate courts to rule on a dispositive jurisdictional issue and decline to reach a subordinate remedial issue. The receiver believes that this case may be the first wherein the appellate court ignored the dominant jurisdictional issue and instead ruled on a subordinate remedial issue. This may have been derived from the 10th Circuit erroneous holding that the Declaratory Judgment Act issue as jurisdictional. 245 F.3d at 1165. *See Schilling v. Rogers*, 363 U.S. 666 (1960) (holding that the Declaratory Judgment Act is merely remedial, not jurisdictional). This error infected the 10th Circuit opinion from beginning to end, and the need to correct it alone is reason to grant certiorari.

constituted a waiver of sovereign immunity as to the real property not before the District Court. The Millers then apparently cited to a string of interventions by sovereigns in *in rem* cases for the proposition that the IRS had waived sovereign immunity for all claims in the *in personam* District Court.

This is, of course, completely wrong, which is why it was delicately described by the 8th Circuit as a "seriously overbroad" reading of the law of waiver of sovereign immunity. *Cf.* IRS Response Brief at p. 9. That contention has nothing whatsoever to do with this case, where the IRS intervened in an *in rem* case but now purportedly is able to unilaterally identify "sub-*res*" groups of assets within the estate and thumb its nose at the court regarding any sub-*res* groups in which it does not currently claim an interest.[5] Under the well-established law, it could do this in an *in personam* case; it cannot do so in an *in rem* case. *The Thekla*; *The Siren*.

That the IRS continues to misread *Miller II* is perhaps best shown by the fact that in *Miller II* the 8th Circuit expressly stated that *The Siren* was still good law. If *Miller II* reads as the IRS now contends, then it is inconsistent with the very plain holding of *The Siren*, *i.e.*, that where the

---

[5] The key to understanding this concept is founded in an understanding of why the IRS intervened without limitation, and could not and did not intervene for a limited purpose under 26 U.S.C. § 7424. The property that was the subject of the IRS's levy was Mr. Mandelman's claim in the receivership action, not the *res* of the Receivership Estate, itself. The levy alone protected this claim; by intervening, the IRS expanded its claim to the entire *res* of the Receivership Estate. By analogy, if the IRS were to have levied against Mr. Mandelman's stock in a corporation that owned a ship, and that ship was the subject matter of an admiralty action, the levy on the stock would not affect the admiralty action. If the IRS, however, were to take a further step and intervene in the admiralty action because it thought a creditor in that action might render its levy valueless, it is no longer merely protecting its interest in the stock, but participating directly in the *in rem* action concerning the ship. In this event, the IRS would not be allowed to intervene for a sub-*res* aspect of the ship. Simply stated, the "lien arising under this title [26]" was not "the property which is the subject of such action or suit." 26 U.S.C. § 7424.

sovereign intervenes in an *in rem* action it waives sovereign immunity for all matters related to that *res*.

At bottom, the IRS contends it gets to decide what the *res* of the receivership is. With all due respect, that is the job of the supervising court, not the IRS. By its repeated orders holding that by intervening the IRS had waived sovereign immunity, the District Court found that the *res* of the receivership was just that, and it could not be broken up into various sub-*res* groups by the IRS years after the fact of its intervention.[6]

If the case must be determined on the basis of the Declaratory Judgment Act, then this Court has authority to review the question of the *Bob Jones* exceptions, as the receiver did raise this before the 10th Circuit in its Petition for Rehearing, pp. 12-15.[7]

The *Bob Jones* issue was raised in the Petition for Rehearing because, as stated above, the issue that was submitted and all the briefing prior to the 10th Circuit opinion had been on the issue of sovereign immunity and intervention in an *in rem* case. The 10th Circuit's ruling based on the face of the Declaratory Judgments Act, however, brought into play for the first time *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-737 (1974) (recognizing two unwritten, judicially created exceptions to the prohibition on declaratory judgments

---

[6]Contrary to the IRS's brief at p. 7, the receiver does seek certiorari on whether the District Court could order the IRS to do its job in a reasonable time regarding the tax returns of both IMMI and Motor. The IRS's attempt to read the receiver's petition as applying only to IMMI and not Motor is disingenuous, especially as the IRS noted at p. 5, n. 1 of its Response that in the petition the receiver used "receivership estate" to include both IMMI and Motor. The IRS is correct on page 7 of its Response when it states that the receiver does not seek certiorari regarding the tax returns of the three companies in Bankruptcy.

[7]The Court can hear a matter raised in a petition for rehearing. *Maryland v. United States*, 381 U.S. 41 (1965) (argument made for first time in petition for rehearing before Circuit Court of Appeals properly preserved for review); *cf. Wisconsin v. Federal Power Commission* 373 U.S. 294 (1963) (matter not raised below, even in petition for rehearing, would not be reviewed)

regarding federal taxes) and its progeny (*Elia v. Connet*, 908 F.2d 521, 523, 526 (9th Cir. 1990) (same); *In re State of Cal. v. Regan*, 641 F.2d 721, 722-23 (9th Cir. 1981) (same)).

There are two "*Bob Jones* exceptions" to the face of the Declaratory Judgment Act as set out by this Court: the first exists where the IRS could, under no circumstances, ultimately prevail (the prerequisites for equity jurisdiction having been met); and the second exists where the taxpayer has no other access to judicial review. The receiver fits within both exceptions.

As to the first, there has been no assessment (after almost two years) upon which the IRS could possibly prevail. This should come as no surprise as the putative taxpayer is a receiver. By definition, the receiver should have no profit that is not distributed as an expense and therefore there can be no taxes due.

As to the second, in a receivership there is truly the only one venue. A claim for taxes against the receivership estate is just that: a claim against the estate. Like any other claim, the receivership court has exclusive venue for claims against the estate. *Wabash Ry. Co. v. Adelbert College*, 114 U.S. 587 (1908).[8]

It is also significant to look at this Court's language which drove its holding in *Bob Jones*: "These allegations leave little doubt that a primary purpose of this lawsuit is to

---

[8]Waiting until the IRS gets around to assessing on its own schedule could result in a perpetual receivership. Unlike the Bankruptcy Code, which under section 505(b) requires the IRS to assess within 6 months upon the request of a Trustee and thus a Trustee can have a tax return determined to be correct or not before the next year's tax return is due, a receiver can only accelerate the process to 18 months. 26 U.S.C. § 6501(d). Thus the IRS can thwart a receiver from ever closing down by not completing its review of any given year until after the next year's tax return is due. As a receiver could be personally liable for unpaid receivership taxes, 31 U.S.C. § 3713, no receiver would risk closing down a receivership until all tax issues were resolved. If the IRS did not intervene in a given receivership to claim taxes were due, however, § 3713 could not apply and thus a receivership could be shut down without risk to the receiver personally.

prevent the Service from assessing and collecting income taxes from petitioner." [*Bob Jones* at 2047]. Here, the exact opposite it true–the sole point of the motion was to get the IRS to assess so that the taxes could be paid (if any were due) and the estate wound up.

The face of the Declaratory Judgments Act does not tell the whole story, as this Court determined in *Bob Jones*. A simple examination of the legislative history of that Act shows it was never intended to prevent the receivership court from entering orders which are necessary to conclude a receivership. The termination of a receivership being supervised by a respected United States District Court Senior Judge should not depend upon an IRS bureaucrat deciding to finally get around to doing his job.[9]

In the short time since it was entered, the 10th Circuit opinion has already produced results that are both very bizarre (including the IRS denying that it is bound by the orders entered by the District Court after it intervened and the IRS taking the position that it may unilaterally dismiss itself from the case after achieving its desired results without risking adverse determination on issues it itself raised) and harmful (enabling the IRS to successfully challenge orders of the District Court in the Massachusetts Bankruptcy Court).

Certiorari should be granted so that it can be made clear that when the IRS intervenes in an *in rem* action it subjects itself to proper orders of the District Court, just as any other party does. *The Siren*; *The Thekla*; 28 U.S.C.

---

[9]The IRS mentions in its Brief [footnote 2, bottom of page 7] that it has provided the receiver with a nearly completed draft examination report (i.e., a "draft assessment") dated September 9, 2001. The purpose for providing this information its brief is not stated, but it highlights the problem. The assessment has apparently been completed for at least four months by the time of this writing, but the IRS has yet to actually assess. This has never been a problem of making the IRS work faster than it can, but getting it to perform at all. It appears that the IRS's agenda is simply to make sure the United States District Court know that the IRS, not the District Court, controls the District Court's docket.

§ 7424.[10] The 10th circuit opinion incorrectly upsets the separation of powers balance by allowing the executive branch in intervene in an *in rem* action but then unilaterally delay and perhaps even defeat resolution of the proceeding for no reason other than a bureaucrat deciding a federal judge cannot order him to do his job.

Respectively submitted this 4th day of January, 2002.

BRENT T. JOHNSON
Counsel of Record
JOHN M. TANNER
FAIRFIELD & WOODS, P.C.
1700 Lincoln Street
Suite 2400
Denver, Colorado 80203-4524
(303) 830-2400

---

[10]28 U.S.C. § 7424 provides: "If the United States is not a party to a civil action or suit, the United States may intervene in such action or suit to assert any lien arising under this title on the property which is the subject of such action or suit. The provisions of section 2410 of title 28 of the United States Code (except subsection (b)) and of section 1444 of title 28 of the United States Code shall apply in any case in which the United States intervenes as if the United States had originally been named a defendant in such action or suit. In any case in which the application of the United States to intervene is denied, the adjudication in such civil action or suit shall have no effect upon such lien."